No. _____

In the
Supreme Court of the United States

FREDERICK MOORE and TOMMIE GRADY
as Co-Administrators and Personal Representatives
of the Estate of FREDERICK GRADY,
Petitioners,

v.

DONALD TULEJA, DEMETRIUS WILLIAMS,
JOSEPH PALMSONE, and DENNIS BOYLE,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Seventh Circuit's Conclusion That A Reasonable Basis Exists In the Record To Support The Jury Verdict Sanctions A Departure From The Accepted And Usual Course Of Judicial Proceedings In That The Court Relied Upon Untested, Unsupported, and Speculative "Scientific" Testimony That Did Not Comport With *Daubert* And, Thus, Conflicts With This Court's Ruling in *Brooke v. Brown*?

II. Whether The Seventh Circuit Sanctioned An Abuse Of Discretion By The District Court When It Affirmed The District Court's Violation Of Its Own Pretrail Order Barring Speculation And Whether Said Ruling Conflicts With This Court's Ruling In *U.S. V. Scheffer* And *Kumho v. Carmichael*?

III. Whether The Seventh Circuit Abused Its Discretion When It Misinterpreted This Court's Ruling In *U.S. V. Young* To Imply That An Attorney Has The Obligation Of Specifically Enumerating The Elements Of Plain Error For That Argument To Be Reviewable As Opposed To See If Those Elements Exist?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiffs-Appellants and Petitioners: Petitioners are Frederick Moore and Tommie Grady, as Co-administrators and Personal Representatives of the Frederick Grady Estate.

Defendant-Appellees and Respondents: The Respondents are Donald Tuleja, Demetrius Williamson, Joseph Palmsone, and Dennis Boyle.

Other Parties Below: The additional plaintiffs below were Diane McGhee and Barbara McKinney, who were voluntarily dismissed from the case. The additional defendants below were Luis Garza, Leo Morales, Captain R. Miller, and the City of Chicago, who were dismissed from the case.

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PETITION FOR A WRIT OF CERTIORARI

Frederick Moore and Tommie Grady, as co-administrators and personal representatives of the Estate of Frederick Grady ("Petitioners") respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Moore v. Tuleja*, 546 F.3d 423 (7th Cir. 2008). On October 6, 2008, the Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois, reported at *Moore v. Morales*, 445 F.Supp.2 1000 (N.D.Ill. 2006), denying Petitioners' Motion for New Trial. See Appendix A.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on October 6, 2008. App. A. This petition is timely under 28 U.S.C. § 2101(c) and the Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

FEDERAL RULES OF EVIDENCE

Rule 103(d) Rulings on Evidence

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 401 Definition of Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by the rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

FEDERAL RULE OF CIVIL PROCEDURE

Rule 16(e) Pretrial Conferences; Scheduling; Management

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Rule 61 Harmless Error

Unless justice requires otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

14th Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of the sudden, unexplained death of Frederick Grady while in the custody of the Chicago Police Department on April 8, 2003.

On April 8, 2003, at approximately 6:25pm, Mr. Grady was in an automobile accident with another vehicle near 18th and Clark. Paramedics John Kaveney ("Kaveney") and Renee Sanchez ("Sanchez") of Ambulance 28 responded. Mr. Grady had no obvious or visible signs of injury as a result of the accident and refused medical treatment and transportation.

At approximately 8:45 p.m., Mr. Grady was at the auto lot where someone towed his vehicle. He was at the lot attempting to remove his tools from his van when the lot owner called the police on him for trespassing. Officers Garza and Morales, responded to the call and subsequently arrested Mr. Grady for trespassing.

When entering lockup, the lockup keeper noted that Mr. Grady had no "obvious signs of pain or injury." Three hours later, Mr. Grady was dead with multiple abrasions on his head, neck, hand, wrist, and forearm.

Later on the morning of April 9, 2003, Dr. Eupil Choi ("Choi"), deputy chief medical examiner of Cook County, conducted an autopsy of Mr. Grady and concluded that he died from natural causes.

Petitioners theorized that the Respondents used excessive force against Mr. Grady, which resulted in

his injuries and could have in him having a heart attack.

Respondents theorized that Mr. Grady entered their custody already with a lacerated hand and, while in their custody, had a heart, fell in his cell, and received the abrasions to his head. Respondents' theory was that the stress of his day caused him to have a heart attack and receive the head injuries.

The District Court issued a pre-trial order prohibiting all witnesses from testifying as to how much stress Mr. Grady could withstand based on Mr. Grady's customary daily physical activity. Specifically, the District Court ruled "...no one can testify what was stressful to Mr. Grady. I will allow the pathologists to testify to the extent of their expert opinion what are different things that are stressful; but after that, we're really getting into speculation as to what was stressful to Mr. Grady and what was not." Appendix B, 19a.

At trial, however, the District Court, over Petitioners' objection, allowed, Dr. Kaufman, the Respondents' pathologist, to speculate about that very thing. As Dr. Kaufman began to speculate that Mr. Grady was having a stressful day, Petitioners' counsel objected. The court overruled that objection and allowed Dr. Kaufman to speculate about what might have caused Mr. Grady's death.

The District Court, in violation of its own pre-trial ruling, allowed Dr. Kaufman to continue to speculate about what was stressful to Mr. Grady. The Dr. Kaufman concluded his speculative testimony by saying, "[s]o these were...the events of that day, and

these were all things that I took into consideration as the potential sources of the...emotional stress [that] was the triggering event of why Mr. Grady dropped dead...Clearly this was a stressful day for him."

After the verdict for the Respondents, Petitioners filed a Motion for a New Trial with the District Court. The District Court denied the motion and the Petitioners appealed to the Seventh Circuit alleging: 1) abuse of discretion by the District Court in denying the Motion for a New Trial, 2) that a reasonable basis did not exist in the record to support the verdict, and 3) Respondents' counsel committed plain error during closing statements that warranted a new trial.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the Seventh Circuit has decided a case in direct conflict with this Court's ruling in *Brooke v. Brown.* 509 U.S. 209 (1993). Here, the Seventh Circuit found that a reasonable basis existed in the record to support the verdict though the testimony it relied upon was unsupported, untested, and speculative. As such, by not granting certiorari and reversing this ruling, the Seventh Circuit would have entered a decision in conflict with this Court.

This Court should grant certiorari because the Seventh Circuit has abused its discretion and sanctioned the District Court's abuse of discretion by affirming the District Court's violation of its own pretrial order against speculation on an ultimate issue in the case. To sanction the District Court's

violation of its own pretrial ruling by allowing a witness to openly speculate without an informed basis to do so would be to sanction an extreme departure from the accepted and usual course of judicial proceedings and would be in conflict with this Court's ruling in *United States v. Scheffer* 523 U.S. 303, 309 (1998) and *Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).*

This Court should grant certiorari to address standards for raising plain error on appeal. Here, the Court's intervention is required to clarify this Court's ruling in *United States v. Young*, 470 U.S. 1 (1985). In *Young*, this Court identified what factors and appellate court should take into consideration in determining whether plain error has occurred and is reversible. The Seventh Circuit, however, has interpreted this Court's ruling in *Young* to mean that if a Petitioner fails to specifically enumerate certain elements then the appellate court is not required to make any inquiry into the record to determine if the factors identified by this Court exist in the record.

I. THE SEVENTH CIRCUIT'S CONCLUSION THAT A REASONABLE BASIS EXISTS IN THE RECORD TO SUPPORT THE JURY VERDICT SANCTIONS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT THE COURT RELIED UPON UNTESTED, UNSUPPORTED, AND SPECULATIVE "SCIENTIFIC" TESTIMONY THAT DID NOT COMPORT WITH *DAUBERT* AND,

THUS, CONFLICTS WITH THIS COURT'S RULING IN *BROOKE V. BROWN.*

The Seventh Circuit denied Petitioners' appeal and concluded that a reasonable basis exists in the record to support the jury verdict.

At trial, Petitioners alleged that the abrasions on Mr. Grady's head occurred while in Respondents' custody "before" the alleged heart attack, thereby supporting their theory that the abrasions were the result of excessive use of force.

Respondents alleged that they never used any force against Mr. Grady and that the abrasions came "after" Mr. Grady had a heart attack then fell to the floor striking his head on the bench and the floor.

To support their theory, Respondents called Dr. Kaufman as a fact witness.[1] Dr. Kaufman testified at trial that Mr. Grady had a heart attack first, then fell to the floor striking his head on two places on the way down.[2]

Thus, he opined for the jury that the abrasions occurred "after" the heart attack. Dr. Kaufman never tested this theory and he never identified any facts or data which he used to support that opinion other than looking at pictures.

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[1] Respondents did not tender Dr. Kaufman as an expert witness, thus, he did not produce any expert report with any opinions that would have been subject to examination prior to trial. The Seventh Circuit's reference to Dr. Kaufman as an "expert" is erroneous. Petitioners called a pathologist who was the only "expert" to testify in this case.

[2] To the contrary, Dr. Kaufman testified during his deposition that it was "unlikely" that Mr. Grady had the heart attack prior to striking his head on some object in the cell. (cite??)

At trial, however, he admitted that he was familiar with a test called a "vital reaction" test that could determine if any inflamed cells were located in the abrasion, which would have indicated that the abrasions developed before the heart attack.

In fact, Dr. Kaufman testified that the pictures showed evidence that Dr. Choi – the medical examiner who received Mr. Grady's body the day he died – performed the "vital reaction" test on the abrasions and that he would defer to Dr. Choi's conclusions of that test.

At trial, Dr. Choi, under cross-examination, testified that he did perform the "vital reaction" test on the abrasions and that the scientific results concluded that the abrasions occurred "before" the heart attack, thereby supporting Petitioners' theory of the case.

After the verdict for the Respondents, Petitioners' filed a motion for a new trial arguing, *inter alia*, that no reasonable basis existed in the record to support the theory that the abrasions occurred "after" a heart attack. The District Court relied on Dr. Kaufman's testimony and stated that his testimony constituted a reasonable basis for the verdict.

Thereafter, Petitioners appealed the verdict and the denial of their Motion for a New Trial arguing, *inter alia*, that no reasonable basis existed in the record to support the jury's belief that the abrasions occurred "after" the heart attack.

In affirming the jury verdict and the District Court's ruling on this point, the Seventh Circuit held that, based on Dr. Kaufman's testimony on this

point, a reasonable basis did exist in the record to support the verdict. Though the Seventh Circuit did not and could not cite to any factual data or tests results that led him to that opinion, the Seventh Circuit stated that Dr. Kaufman's testimony "provides a reasonable basis for the jury to have concluded that the head abrasions occurred as Grady fell to the floor after the heart attack." App. A, 14a.

This Court, however, has concluded that such testimony cannot serve as a reasonable basis to support a jury's verdict.

In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the petitioner sued alleging predatory price discrimination. 509 U.S. 209. The petitioner called an expert witness to help support it's theory of the case. The expert, however, did not base his opinion on "market facts", but based it on the respondent's pricing structure, respondent's corporate documents, and evidence of below-cost pricing. *Id.* at 242-43. This Court held that evidence to be "insufficient as a matter of law...[thus] the expert testimony cannot sustain the jury's verdict." *Id.* at 243.

This Court reasoned that "[w]hen an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Id.* at 242. *See also, Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000) ("Inadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis.'")

The *Brooke* opinion follows *Daubert*, the seminal case regarding qualifications of a witness seeking to provide scientific testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In *Daubert*, this Court held that, pursuant to the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. In rejecting the speculative and unsupported expert and non-expert, scientific opinions of witnesses, this Court has held that, in excluding such testimony, "[a] court may conclude that there is too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Ironically, the Seventh Circuit has also acknowledged the need for scientific testimony, whether from an expert or non-expert, to meet the reliability prong of *Daubert* to be admissible. See, *Aliotta v. Nation R.R. Passenger Corp.*, 315 F.3d 756, 760 (7th Cir. 2002).

According to the Seventh Circuit, an "expert's work is admissible only to the extent that it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff – deploying neither data nor analysis – is not an acceptable methodology." *Naeem v. McKesson Drug Co.*, 44 F.3d 593, 608 (7th Cir. 2006), *citing Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir.2000). *See Masters v. Hesston Corp.*, 291 F.3d 985 (7th Cir. 2002)(held the trial court properly excluded petitioner's expert witness because the expert did not

design, test, or measure his alternative theory prior to formulating his opinion and said opinions were, therefore, unreliable.) *See also, Winters v. Fru-con, Inc.*, 498 F.3d 734 (7th Cir. 2007), (the trial court rejected the experts' testimony as unreliable because the experts failed to test their theory or utilize other methods to compensate for their lack of testing.)

The Seventh Circuit has gone so far as to say that an "experts' opinions are worthless without data and reasons[,]" *U.S. v. Mamah*, 332, F.3d 475, 478 (7th Cir. 2003), *citing Kenosha v. Heublein*, 895 F.2d 418, 420 (7th Cir. 1990); *see also Elliott v. CFTC*, 202 F.3d 926, 934 (7th Cir. 2000), and "[a] court is expected to reject 'any subjective belief or speculation.'" *Ammons v. Aramark Uniform Services, Inc.*, 368 F.3d 809, 815 (7th Cir. 2004), *citing Chapman v. Maytag*, 297 F.3d 682, 687 (7th Cir. 2002).

In this case, however, the Seventh Circuit relied upon Dr. Kaufman's "worthless" opinion and failed to reject "subjective...speculation" when it denied Petitioner's appeal and held that Dr. Kaufman gave credible testimony as to when Mr. Grady received the head abrasions. This testimony was untested, unsupported, unscientific, speculative, and contradicted by Dr. Choi's scientific conclusion that the abrasions occurred "before" the heart attack.

The Court, here, should not only follow its rationale in *Brooke v. Brown*, but also consider the Seventh Circuit's holding in *Smith v. Ford Motor Co.*, which is quite instructive on this point. 215 F.3d 713 (7th Cir. 1991). There, the Seventh Circuit held that "[a] court abuses its discretion when it commits 'a

serious error of judgment, such as reliance on a forbidden factor or failure to consider an essential factor.'" *Id.* at 717, *citing Powell v. AT&T Comm., Inc.*, 938 F.2d 823, 825 (7th Cir. 1991).

Since "the court's gatekeeping function focuses on an examination of the expert's methodology[,]" *Id.* at 718, and Dr. Kaufman did not and could not offer any methodology for how he reached the conclusion that the head abrasions occurred after a heart attack, the Seventh Circuit, in affirming the District Court's denial of Petitioners' Motion for a New Trial, sanctioned the District Court's abuse of discretion and relinquishment of its "gatekeeing function" when it found that Dr. Kaufman's testimony served as a reasonable basis to support the jury verdict.

Wherefore, this Court should: 1) find that the denial of Petitioners' appeal on the basis of Dr. Kaufman's testimony directly conflicts with this Court's holding in *Brooke v. Brown,* 2) find that the Seventh Circuit abused its discretion in affirming the District Court's ruling on this basis, and 3) reverse the Seventh Circuit's ruling and grant Petitioners a new trial, or, in the alternative, direct the Seventh Circuit to reconsider its ruling absent a reliance on Dr. Kaufman's testimony on this point.

II. THE SEVENTH CIRCUIT SANCTIONED THE DISTRICT COURT'S ABUSE OF DISCRETION BY AFFIRMING THE DISTRICT COURT'S VIOLATION OF ITS OWN PRETRIAL ORDER BARRING SPECULATION AND IN CONFLICT

WITH THIS COURTS RULING IN *U.S. V. SCHEFFER* AND *KUMHO V. CARMICHAEL.*

The Seventh Circuit denied Petitioners' appeal and concluded that the District Court did not violate its pretrial order when it allowed Dr. Kaufman to speculate as to whether or not Mr. Grady was unduly stressed as a result of the events that occurred on the day of his death.

In this case, Petitioners theorized that Mr. Grady was the victim of excessive use of force and suffered multiple injuries that likely precipitated a heart attack.

Respondents denied using any force on Mr. Grady and theorized that injuries occurred after Mr. Grady had a heart attack due to his stressful day. The Respondents, however, did not present a cardiologist, nor Mr. Grady's personal physician, to testify as to what specific things were stressful to Mr. Grady, personally.

Thus, during the pretrial conference[3], the District Court stated, unequivocally, that "no one can testify

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[3] The purpose of a pre-trial order is to control the subsequent course of action taken by the parties. Fed.R.Civ.P. 16. It is well settled and common practice among federal courts to vigorously enforce pre-trial orders. Litigants look to the court for guidance in regards to a variety of issues; particularly, admissibility of evidence issues.

A court's pre-trial ruling on an evidence issue has the potential to affect the outcome of the trial in that physical evidence, demonstrative evidence, and/or testimonial evidence which may be helpful/harmful/critical to either side can be barred from being presented to the jury.

In order to expedite the judicial process by preventing

about what was stressful to Mr. Grady. They can testify as to what was stressful in general, but beyond that, we're really getting into speculation as to what was stressful to Mr. Grady and what was not." App. B, 23a-24a.

At trial, however, Dr. Kaufman began to speculate as to what was stressful to Mr. Grady and Petitioners' objected. The District Court overruled the objection and allowed Dr. Kaufman to speculate as to what was stressful to Mr. Grady, personally. In particular, Dr. Kaufman, who was not a cardiologist, who never met Mr. Grady, and who never performed any diagnostic tests on Mr. Grady while he was alive, testified that as a result of the events of Mr. Grady's day prior to his death, "he was already in a high state of stress." Dr. Kaufman, in direct violation of the pretrial order, went on to speculate that, "[c]learly this was a stressful day for him [Mr. Grady]."

Since Petitioners alleged that excessive use of force caused Mr. Grady's injuries and could have ultimately led to the heart attack and Respondents alleged that the "stressful" events of Mr. Grady's day led to the heart attack absent any use of force, Dr. Kaufman's speculation went directly to the ultimate issue in the case.

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repeated breaks in a trial to address evidentiary issues, and given the potential ramifications of an adverse evidence ruling, parties are encouraged and/or required to resolve such issues prior to trial through pretrial conferences and motions. As a result, each side enters trial justifiably relying on such rulings.

After the verdict for the Respondents, Petitioners filed a Motion for a New Trial arguing, *inter alia*, that the District Court abused its discretion by allowing Dr. Kaufman to speculate beyond his area of expertise on the ultimate issue in the case and in violation of the District Court's own pretrial order. The District Court denied the motion and did not specifically address this point in his oral ruling.

Thereafter, Petitioners' appealed the denial of their motion arguing, *inter alia*, that the District Court abused its discretion by allowing Dr. Kaufman to speculate as to what was particularly stressful to Mr. Grady.

In affirming the District Court's ruling, the Seventh Circuit sought to clarify the District Court's pretrial ruling and held that:

> [T]he essence of this ruling was that, while the experts could discuss stress in general, they could not speculate about whether Grady had a particular resistance to stress. Our review of the transcripts makes clear that when Dr. Kaufman testified that the accidents and arrest were stressful to Grady, he meant that such events would have been stressful to anyone. Indeed, when asked by defense counsel whether he was 'speculating that these issues caused stress to Mr. Grady,' Dr. Kaufman responded, 'Any one, yes.'

This Court has held that speculation is unreliable and is not a reasonable ground for expertise testimony. *Daubert*, 509 U.S. at 589-90. "Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, e.g., Fed. Rules Eivd. 702, 802, 901." *United States v. Scheffer*, 523 U.S. 303, 309 (1998).

This Court has further held that the trial court's function under *Daubert* is to exercise its discretion "to choose among reasonable means of excluding expertise that is fausse and science that is junky". *Kumho*, 526 U.S. at 159.

On *Daubert*, the Seventh Circuit has held that "[o]ne of the 'purpose[s] of *Daubert* standard is to ensure that any admitted scientific evidence is reliable; that is well-grounded in methods and procedures of science.'" *Winters v. Fru-con, Inc.*, 498 F.3d 734 (7th Cir. 2007), citing, *Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002).

"An expert must substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless." *Winters v. Fru-con*, 498 F.3d at 743, *citing Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999).

"[A] supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method." *Smith v. Ford*, 215 F.3d 713, 718 (7th Cir. 2000), citing, *Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th Cir. 1999).

Hypothetical alternatives provided by witnesses offering scientific testimony "must themselves have 'analytically sound bases' so that they are more than mere "speculation"'. *Id.*, *citing DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998).

In determining the reliability of scientific testimony, the court is required "to consider whether the testimony has been subjected to the scientific method, ruling out any subjective belief or unsupported speculation." *Chapman v. Maytag*, 297 F.3d at 687, *citing Porter v. Whitehall Labs, Inc.*, 9 F.3d 607, 614 (7th Cir. 1993).

As noted above, "[a] court is expected to reject 'any subjective belief or speculation.'" *Ammons v. Aramark,* 368 F.3d at 815.

Here, neither the District Court, nor the Seventh Circuit, rejected "speculation" and, thus, sanctioned the admission of "fausse" and "junky" science into the trial.

The citation to the transcript by the Seventh Circuit substantiates and wholly corroborates Petitioner's argument that the Seventh Circuit sanctioned a clear violation of the trial court's pre-trial ruling.

The statements made by Dr. Kaufman cited above cannot be viewed as broad, general statements about what things are stressful in general. Dr. Kaufman unequivocally stated that the events of Mr. Grady's day caused him to be "in a high state of stress" and that "clearly this was a stressful day for him."

To bolster their position that Kaufman was speaking generally, the appellate court cites Dr. Kaufman's

testimony wherein he admits that he was "speculating that these issues caused stress to Mr. Grady...Anyone, yes." Id. That is exactly what the trial court ordered could not be done during the trial.

Since these statements were specifically directed to what would be stressful to Mr. Grady, they were a clear violation of the trial court's pretrial order. This speculation on an ultimate issue in the case affected the fairness and integrity of the process and warranted a remand.

Kaufman's Speculation Was Not Harmless Error.

According to Fed.R.Civ.Proc. 61, "Unless justice require otherwise, no error in admitting or excluding evidence – or any other error by the court or a party – is ground for granting a new trial... [and] the court must disregard all errors and defects that do not affect any party's substantial rights."

As discussed in detail above, Dr. Kaufman presented unfounded speculation on the ultimate issue in the case. Absent his speculative testimony, the Seventh Circuit would be unable to cite to any other evidence in the record to support the premise that the head abrasions occurred "after" a heart attack and as the result of striking the bench and the floor after collapsing.[4]

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[4] The crime scene investigator called by the Respondents testified that the theory of transfer is when two objects come together and matter is transferred between the two, however, he went on to testified that even though Mr. Grady had two abrasions on his head, nothing in the cell had any blood on it.

III. THE SEVENTH CIRCUIT ABUSED ITS DISCRETION WHEN IT MISINTERPRETED THIS COURT'S RULING IN *U.S. V. YOUNG* TO IMPLY THAT AN ATTORNEY HAS THE OBLIGATION OF SPECIFICALLY ENUMERATING THE ELEMENTS OF PLAIN ERROR FOR THAT ARGUMENT TO BE REVIEWABLE AS OPPOSED TO THE APPELLATE COURT REVIEWING THE RECORD TO SEE IF THOSE ELEMENTS EXIST.

The Seventh Circuit denied Petitioners' appeal and, in essence, concluded that it was not obligated to review Petitioners' plain error argument because Petitioners did not specifically enumerate the elements in their brief or during oral argument.

The plain error at issue is Respondents' counsel's statements during closing argument.

During the trial, Respondents made their financial status an issue in the case. As a result, Petitioners argued to the District Court that Respondents opened the door to allow Petitioners to state that the city would indemnify them for any compensatory award if they so chose to grant the Petitioners a monetary award.

During closing argument, Respondents' counsel stated that, "The city is not a random amorphous entity. It's you. We're talking about tax dollars here." Petitioners' counsel did not object to this statement after it occurred.

After the verdict for the Respondents, Petitioners filed a Motion for a New Trial arguing, *inter alia*, that Respondents' counsel committed plain error by imputing to the jury a pecuniary interest in any monetary award they may have been inclined to award the Petitioners. The District Court denied the motion and stated that the statements did not amount to plain error. App. C, 34a.

Thereafter, Petitioners' appealed the denial of their motion arguing, *inter alia*, that the District Court abused its discretion by denying that Respondents' counsel committed plain error which had a negative effect on Petitioners' substantial right to an impartial jury.

In denying Petitioners' appeal, the Seventh Circuit stated,

> Plain error is only available in civil cases if a party can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied...Because the plaintiffs have made no attempt – either in their briefs or at oral argument – to show that these elements have been satisfied, we decline to review for plain error.
>
> See App A, 15a.

Clearly, the Seventh Circuit took the position that since Petitioners did not specifically enumerate the

elements cited, it was under no obligation to review the error alleged to see if it constituted reversible plain error as opposed to harmless error.

This Court, however, has imposed no such requirement on a party to so enumerate as a prerequisite for review.

A. The Seventh Circuit Seeks to Alter The Essence of the Plain Error Doctrine From Analyzing the Error to Analyzing the Petitioners' Actions.

According to the Federal Rules of Evidence, "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Fed.R.Evid. 103(d). Thus, the heightened attention provided to allegations of plain error is to ensure the integrity of the judicial process, not to sanction failing to contemporaneously object to an erroneous statement. The Seventh Circuit has adopted the following elements for review of a claim of plain error: (1) that exceptional circumstances exist; (2) that substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied. *See, e.g., Estates of Moreland v. Dieter*, 395 F.3d 747, 756 (7th Cir. 2005).

Presumably, the Seventh Circuit adopted these elements from this Court's holding in *United States v. Young*. In *Young* this Court held that Rule 103(d)

> authorizes the Courts of Appeals to correct only

> "particularly egregious errors," *United States v. Frady*, 456 U.S. 152, 163 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States v. Atkinson,* 297 U.S., at 160. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Frady*, 456 U.S., at 163 , n. 14.

No where in this case, however, did this Court impute some obligation on a party to specifically enumerate which elements it was addressing as opposed to highlighting for appellate courts what factors they should consider when reviewing claims of plain error.

B. Reversible Plain Error Occurred Because the Error Was So Egregious That It Affected Petitioners' Substantial 14th Amendment Rights To An Impartial Jury And Resulted In A Miscarriage Of Justice.

1. Plain Error Occurred

In the present case, plain error occurred when Respondents' counsel imputed a pecuniary interest

in the outcome of the case to the jury when she argued that any award that the jury may have been inclined to the Petitioners would come out of their tax dollars with the implication being that their taxes may go up based on the amount of the award.

The District Court acknowledged that the statement was error, App. C, 34a. The Seventh Circuit also noted that the imputation of a pecuniary interest to the jury was improper. App. A, 14a.

Thus, it is undisputed that this statement constituted error and since Petitioners did not object to this statement during closing argument, this matter can only be reviewable under the doctrine of plain error so long as the erroneous statement affected substantial rights of the Petitioners.

2. Fourteenth Amendment Right To An Impartial Jury

Petitioners' substantial right to an impartial jury which is implied in the due process clause of the Fourteenth Amendment was affected by Respondents' counsel's erroneous statement during closing argument.

This Court has held that "it certainly violates the Fourteenth Amendment...to subject [a person's] ...property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey*, 273 U.S. 510, 523. This Court has held that:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, the "every procedure which would offer a possible temptation to the average man as a judge... not to hold the balance nice, clear and true between the [parties denies a party] due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14.

In re Murchison 349 U.S. 133, 136-37.

Based on this Court's prior holdings, the Petitioners' Fourteenth Amendment Due Process Rights were affected by Respondents' counsel's erroneous statement during closing argument which imputed pecuniary interest i.e. bias to the jurors.

3. Miscarriage Of Justice Occurred Because Evidence Weighed Heavily In Petitioners' Favor

This Court has held that a reviewing court cannot properly determine whether plain error existed unless it viewed "such a claim against the entire record...It is simply not possible for an appellate court to assess the seriousness of the claimed error by any other means." CITE

Here, had the Seventh Circuit reviewed the entire record to determine whether a miscarriage of justice resulted from the erroneous statement, it would have found that the weight of the evidence heavily favored Petitioners' theory.

Petitioner alleged that Mr. Grady was not injured when he entered Respondents' custody and eleven witnesses, including all the Respondents, testified that Mr. Grady was not injured when he entered his police cell as opposed to only five witnesses called by the Respondents who said he was injured prior to entering their custody.

In addition, Petitioners presented seven police and paramedic documents that were either silent on

the issue of an injury or directly stated that Mr. Grady was not injured at the time he entered Respondents' custody. Conversely, Respondents offered only one paramedic report that gave a vague, passing reference to a hand injury.

These issues and others raised by the Petitioners in their Motion for a New Trial and appeal brief highlight the overwhelming evidence that supported Petitioners' theory of the case and the comparatively lacking evidence that supported Respondents' theory.

Thus, this Court is left to presume that the jurors were swayed by the imputation of pecuniary interest to them by Respondents' counsel during closing argument as the basis for their verdict for the Respondents. Wherefore, Petitioners maintain that a miscarriage of justice did occur as the jury made a decision based on personal interest and not the evidence presented at trial.

C. Petitioners Did Properly Raise And Address Each Prong Of The Plain Error Doctrine, Though Not Specifically Enumerated.

Petitioners agree that the elements of plain error as stated by the Seventh Circuit were not specifically enumerated in their appeal brief. Petitioners, however, disagree that the elements were not cumulatively raised in their brief and during oral argument.

1. Petitioners' Raised and Met the "Exceptional Circumstances" Prong of the Plain Error Doctrine

Petitioners' counsel raised, during oral argument, the existence of exceptional circumstances.

At oral argument, Petitioners' counsel argued that "in defense counsels' closing argument, she imputed a pecuniary interest to the jurors...." Thus, Petitioners did argue and met the first prong of the plain error review in that the raising of a pecuniary interest to the jurors for the first time during closing arguments was an "exceptional circumstance". Defense counsels did not previously indicate that they sought to make such a statement during closing argument and, thus, Petitioner's counsel was not put on notice that they intended to make such statements.

Moreover, Petitioners' counsel stated during oral argument that defense counsel "basically implied [to the jury] that 'if you rule for the Plaintiffs, you're going to have to pay." The imputation of a pecuniary interest in the outcome of a case is "exceptional" in and of itself. Even the Seventh Circuit noted in its opinion that, "[c]losing remarks that appeal to jurors' pecuniary interests as taxpayers are, *of course*, generally improper. *United States v. Schimmel*. 943 F.2d 802, 806 (7th Cir. 2001)." Emphasis added. App. A, 14a.

Thus, Petitioners did raise – during oral argument – that exceptional circumstances existed, which warranted the review of defense counsel's

closing argument statements under the plain error doctrine.

2. Petitioners' Raised and Met the "Substantial Rights Are Affected" Prong of the Plain Error Doctrine

It is axiomatic to state that both sides in any judicial proceeding have a "substantial right" to a fair and impartial jury. Petitioners' counsel raised, during oral argument, that defense counsel's statement during closing argument affected this substantial right to a fair and impartial jury.

During oral arguments, Petitioners' counsel stated that, "under no circumstances is a defense counsel allowed to jeopardize the fairness and integrity of a trial... [by saying the jury has] to pay" for any monetary award for the Petitioners. This system of jurisprudence does not allow or condone the imputation of a pecuniary interest in the outcome of a case to a jury because that will invariably affect the partiality of the jury.

Thus, Petitioners did raise – during oral argument – that defense counsel's imputation of a pecuniary interest to the jury affected Petitioners' substantial right to a fair and impartial jury, which further warranted the review of defense counsel's closing argument statements under the plain error doctrine.

3. Petitioners' Raised and Met the "Miscarriage of Justice" Prong of the Plain Error Doctrine

Petitioners raised in their brief and Petitioners' counsel raised – during oral argument – that a miscarriage of justice would result if defense counsel's statements were not reviewed under the plain error doctrine.

The entire case revolved around the issue of whether or not Mr. Grady was injured when he entered police custody. If he had a hand injury prior to entering police custody, it was less likely that the hand injury was the result of excessive use of force. If it occurred after he entered police custody, the only explanation was that it was the result of excessive use of force.

In their brief, Petitioners, while not using the phrase "miscarriage of justice" argued that, based on the evidence presented at trial, a verdict rendered solely on pecuniary concerns and not on the evidence presented at trial would result in denial of justice particularly since every Respondent testified that Mr. Grady was not injured when he entered their custody. Specifically, Petitioners, in their Appellate Brief stated,

> By the time the parties reached closing arguments two of the three medical had testified in favor of the Plaintiffs. Matthews and Choi testified that it was practically impossible for the laceration to have come from a sharp object. Additionally, all Defendants testified that Mr.

> Grady was not injured when he entered the lock up. However, it took the jury a little over an hour to find the Defendant's not liable in a case that took more than a week to complete. Arguably, the jury determined that they did not want to foot the bill and decided against the Plaintiffs in this matter.

This argument, in effect, argues that a miscarriage of justice occurred because the jury, invariably, disregarded the evidence presented at trial in an effort to absolve themselves of any pecuniary interest in the outcome of the case.

During oral argument, Petitioners' counsel argued that the Court would need to review defense counsel's statements in "consideration with the evidence that was presented" at trial. The evidence presented at trial was the same evidence noted in Petitioners' brief, which was that all five defendants testified that Mr. Grady was not injured when he entered their custody.

Thus, Petitioners did raise and meet the third prong of the plain error analysis because they argued in their brief and during oral argument that a miscarriage of justice would result if defense counsel's closing argument statements were not reviewed under the plain error doctrine.

Wherefore, the Petitioners implicitly argued each plain error prong and thus said argument should have been considered by the 7th Circuit.

CONCLUSION

For all the foregoing reasons, petitioners respectfully that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED OCTOBER 6, 2008

In the
United States Court of Appeals
For the Seventh Circuit

No. 07-3137

FREDERICK MOORE and TOMMIE GRADY
as Co-Administrators and Personal Representatives
of the Estate of FREDERICK GRADY,
Plaintiffs-Appellants,

v.

DONALD TULEJA, DEMETRIUS WILLIAMSON,
JOSEPH PALMSONE , and DENNIS BOYLE ,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 2545—**Ruben Castillo,** *Judge.*

ARGUED MAY 29, 2008—DECIDED OCTOBER 6, 2008

Before CUDAHY, POSNER and TINDER, *Circuit Judges.*

CUDAHY, *Circuit Judge.* On the evening of April 8, 2003, Frederick Grady was involved in a major traffic accident. Although Grady escaped without serious injury, his van rolled over on its side and was severely damaged. Later that night, Grady was arrested when he trespassed on the

private lot where his damaged van was being held. He was taken to a Chicago police station and placed in a holding cell. In the early morning hours of April 9, 2003, Grady was found unconscious and unresponsive in his cell. Attempts by paramedics to revive Grady were unsuccessful, and Grady tragically died. An autopsy conducted by the Cook County Office of the Medical Examiner concluded that Grady had suffered a fatal heart attack.

Although the autopsy concluded that Grady died from natural causes, injuries found on Grady's body raised suspicion in the minds of his family and friends. They believe that Grady had been beaten in his cell by jail personnel and that this beating precipitated the fatal heart attack. The plaintiffs, co-administers of Grady's estate, brought this suit under 42 U.S.C. § 1983, claiming that the defendant police officers and jail personnel deprived Grady of his rights under the Fourth and Fourteenth Amendments by using excessive force and denying him medical care.

The case was tried before a jury. The trial lasted seven days; the jury heard all of the plaintiffs' evidence and returned a verdict in favor of the defendants in just over an hour. The plaintiffs made a motion for a new trial but the district court denied the motion, noting that the jury's verdict was reasonable in light of the "weak liability case" presented by the plaintiffs. The plaintiffs now appeal the denial of their motion for a new trial. We AFFIRM.

I.

Grady was involved in two separate car accidents on April 8, 2003. The first was relatively minor. The second, which occurred at roughly 6:30 p.m., was more serious. In that accident, Grady's van crossed out of its lane and struck another vehicle, causing both vehicles to flip over. Officer Andrew Lucca of the Chicago Police Department responded to the scene, as did paramedics Renee Sanchez and John Kaveney. Grady was wearing his seat belt and escaped the crash with only minor bumps and bruises. He initially refused medical treatment and refused to be taken to the hospital. Grady, who worked as a carpenter, told Sanchez that he had to go back to get his carpentry tools out of his van. Sanchez warned Grady that he should stay away from the van because "there was broken glass and stuff." Despite the warning, Grady reached into the van, cutting his right hand rather seriously in the process. The paramedics bandaged Grady's hand—a fact that they recorded in their log—and replaced the dressing once more after Grady bled through the first bandage. Grady again refused to be taken to the hospital. Instead, he was released.

At 8:45 p.m. that evening, Grady trespassed on the lot where his van was being stored in an attempt to retrieve his tools. The lot owner called the Chicago Police Department. Officers Leo Morales and Luis Garza arrived at the scene and arrested Grady. As Officer Morales placed Grady in handcuffs, he noticed the bandage on Grady's hand. Officers

Morales and Garza confiscated Grady's tools and took him back to the station. They handcuffed

Grady to a bench in the police station while they filled out the arrest report. At that point, Officer Garza noticed the bandage and asked Grady what had happened. Grady told him that he had a car accident but did not elaborate; Grady also declined medical assistance. The arrest report, which focused on the facts surrounding the alleged criminal trespass, did not mention the injury to Grady's hand.

Officers Morales and Garza then uncuffed Grady and turned him over to lockup personnel. There was a strict policy against handcuffs in the lockup, and Officer Morales stated that he took the handcuffs with him. Grady was processed by Officer Donald Tuleja, who did a quick medical check of Grady while he sat behind a desk. He did not observe any active bleeding, and Grady denied that he needed medical care. The intake report did not note the bandage on Grady's hand. Palmsone took Grady's photograph; Williamson took his fingerprints. The photograph reveals that Grady had no injuries to his head when he entered the jail. Although neither Palmsone nor Williamson noticed the bandage on Grady's hand, no fingerprint was taken of Grady's right hand. Grady was apparently cooperative with jail personnel, who allowed him to make a phone call. Grady called his longtime companion, Kathryn Tierno, and told her that he was "very concerned about his tools." Grady was then walked to his cell, which contained a toilet, a sink and a metal bench. Robert Gonzales, who was in the cell next to Grady, saw Grady being taken to his cell and noticed the bandage on his hand.

Personnel at the jail made rounds of the lockup every fifteen minutes. Grady was calm and courteous. On one occasion, Grady asked Williamson about his tools. Palmsone, who made the majority of rounds, said that Grady slept most of the night. Gonzales, who was in the cell next to Grady, remembered hearing nothing but coughing and snoring coming from Grady's cell. When Palmsone made his rounds at 1:30 p.m., he noticed Grady sitting up on his bench. Approximately ten minutes later, Gonzales stated that he heard a "thump" in Grady's cell followed by silence. When Palmsone made his rounds at approximately 1:45 p.m., he found Grady unconscious and unresponsive on the floor of his cell. Palmsone ran to get Officer Tuleja, who called Sergeant Dennis Boyle and Captain Raymond Miller for help. A log reflects that the fire department and paramedics were called at 1:45 p.m. Sanchez and Kaveney arrived to find Grady in a state of cardiac arrest on the cell floor. They were unable to resuscitate him. Grady was taken to the hospital, where he was pronounced dead. An autopsy conducted by Dr. Eupil Choi determined that Grady had died naturally of a heart attack. The autopsy also revealed that Grady had a number of injuries to his body, including a hand laceration, two abrasions on his head and scrapes on his wrist and neck. Sergeant Boyle examined the cell and found no signs of struggle; investigators from the office of internal affairs arrived later and also examined the cell. They too found no evidence of wrongdoing.

The plaintiffs filed this action under 42 U.S.C. § 1983 action on April 8, 2004. They alleged that

Williamson and Palmsone used excessive force on Grady, that Officer

Tuleja failed to intervene and that Sergeant Boyle and Captain Miller denied Grady medical care. The plaintiffs also alleged that Officers Morales and Garza had arrested Grady without probable cause.[1] The plaintiffs' theory was that Grady angered Palmsone and Williamson by constantly complaining about his tools. Palmsone and Williamson had finally "snapped," striking Grady—who the plaintiffs believe was still handcuffed—with a baton. As Grady raised his hands to defend himself, the baton lacerated his hand and the force of the blow knocked the handcuffs into Grady's wrists and against his head, causing abrasions. The plaintiffs claim that Officer Tuleja saw the beating take place but failed to intervene. Further, they claim that Sergeant Boyle and Captain Miller delayed calling the paramedics until after the defendants had finished cleaning the cell and concealing evidence of the use of excessive force.[2] The plaintiffs' case focused almost entirely on inferences based on the nature of the injuries found on Grady's body; they claimed that the only reasonable medical conclusion was that Grady had been struck with a blunt object in his cell.

The jury trial lasted seven days. The jury heard testimony from almost all of the individuals who came into contact

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[1] The district 1 court granted summary judgment in favor of Officers Morales and Garza. The plaintiffs do not appeal this decision.

[2] During the trial, the district court granted judgment as a matter of law as to Captain Miller. The plaintiffs do not appeal this decision.

with Grady that day, including Officer Morales, Officer Garza, Officer Tuleja, Palmsone, Williamson and Gonzales. They all denied that any wrongdoing had taken place. Dr. Choi, who conducted the original autopsy of Grady, testified at trial that he believed that Grady's death was natural. The plaintiffs retained Dr. Michael Kaufman to reexamine Dr. Choi's work but, after conducting his own autopsy, Dr. Kaufman also concluded that Grady's death was natural. The plaintiffs' case was based almost entirely on testimony of Dr. Besant-Matthews, who did not have an opportunity to examine Grady's body but reviewed the medical evidence in the case. The jury returned a verdict in favor of the remaining defendants in a little more than an hour. The plaintiffs moved for judgment as a matter of law under Rule 50(b) or a new trial under Rule 59(a) but the district court denied the motions. The plaintiffs now appeal the denial of their post-trial motions.[3]

II.

The plaintiffs argue that the district court erred in denying their motion for a new trial under Rule 59(a). *See* FED. R. CIV. PRO. 59(a). We review the denial of a motion for a new trial for abuse of discretion. *See Kapelanski v. Johnson*, 390 F.3d 525,

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[3] We decline 3 to review the denial of the Rule 50(b) motion because the plaintiffs did not file a motion for directed verdict before the jury returned its verdict. *See Van Bumble v. Wal-Mart Stores, Inc.*, 407 F.3d 823, 827 (7th Cir. 2005).

530 (7th Cir. 2004). "A party seeking to reverse a district court's denial of a motion for a new

trial bears a particularly heavy burden." *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559, 569 (7th Cir. 2004). A verdict will be set aside as contrary to the manifest weight of the evidence only if "no rational jury" could have rendered the verdict. *See King v. Harrington*, 447 F.3d 531, 534 (7th Cir. 2006). Jury verdicts deserve particular deference in cases with "simple issues but highly disputed facts." *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995). We conclude that there was a reasonable basis for the jury's verdict in this case.

We begin with the common ground. Each of the medical experts that testified at trial (Dr. Choi, Dr. Kaufman and Dr. Besant-Matthews) diagnosed Grady with severe valvular heart disease. Dr. Choi and Dr. Kaufman also diagnosed him with severe coronary atherosclerosis. All of the experts agreed that these conditions had gone undiagnosed and were already very advanced. Thus, the parties agree that Grady suffered a fatal heart attack.

The disputed issue concerns the trigger for the heart attack. Dr. Kaufman and Dr. Choi both testified that Grady died a natural death. Grady already suffered from two serious heart diseases that were highly advanced. Any stress he experienced, whether physical or emotional, would increase the likelihood of a fatal heart attack.[4]

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[4] The plaintiffs insist that Dr. Kaufman violated a pre-trial ruling when he stated that Grady had a stressful day. Some background is in order here. Before trial, the plaintiffs intended to have Dr. Besant-Matthews testify that Grady, who carried his own drum set to blues concerts and worked long hours as a

Indeed, Grady could have suffered the heart attack without any apparent triggering event at all. Many individuals who suffer from this type of advanced heart condition simply die in their sleep. Dr. Kaufman emphasized that Grady was "living on borrowed time" and could have simply "dropped dead suddenly and unexpectedly." Dr. Besant-Matthews, however, testified that the nature of the injuries to Grady—a hand laceration, two head abrasions and scrapes on his wrists—indicated that all of the injuries occurred at the same time and that Grady had most likely been beaten with a baton by jail personnel.

We turn first to the hand laceration. The plaintiffs assert that this injury was sustained while Grady was fending off the alleged attack in the cell. But they face an uphill battle in their attempt to prove that there is no reasonable

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carpenter, was better able to endure the stress of an accident and an arrest than an average person would be. The defendants moved to bar this line of questioning. The district court agreed, ruling that "no one can testify about what was stressful to Mr. Grady." The essence of this ruling was that, while the experts could discuss stress in general, they could not speculate about whether Grady had a particular resistance to stress.

Our review of the transcripts makes clear that when Dr. Kaufman testified that the accidents and arrest were stressful to Grady, he meant that such events would have been stressful to anyone. Indeed, when asked by defense counsel whether he was "speculating that these issues caused stress to Mr. Grady," Dr. Kaufman responded, "Any one, yes."

basis to conclude otherwise. Paramedics Sanchez and Kaveney both testified at trial that they were present when Grady injured his hand reaching into his van and their log reflects that they treated this wound at the scene of the accident. Officers Garza and Morales, as well as fellow arrestee Gonzales, testified that they saw the bandage on Grady's hand before he entered his cell.[5] Nevertheless, the plaintiffs argue that this testimony may be disregarded because it is contrary to "indisputable" laws of nature. *See, e.g., Kansas City Pub. Serv. Co. v. Shepard*, 184 F.2d 945, 947 (10th Cir. 1950). They contend that Grady could not have cut himself on broken glass because the autopsies revealed "bridging," or intact intermediate tissue, in the hand laceration. Bridging is a common sign of blunt force trauma, and the plaintiffs claim that it is fundamentally inconsistent with the defendants' theory that Grady cut his hand on a sharp object. Contrary to the plaintiffs' assertions, however, Sanchez and Kaveney never claimed to have seen exactly how Grady's hand was "cut." Sanchez testified that "the doors were bent because of the accident" and that Grady "either grabbed the door or grabbed something on the seat and cut his hand." When pressed on this question, Sanchez stated, "All I know is that Mr. Grady went to his car . . . and he went to reach

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[5] The plaintiffs argue that Gonzales contradicted himself on this point. Specifically, they note that Gonzales testified that he saw the bandage on Grady's hand but later testified that Grady did not appear injured. This semantic argument hinges on the meaning of "injury." The extent to which Gonzales was actually impeached on this point was for the jury to determine.

for something, [and] ended up cutting himself." This testimony is thus consistent with that of Dr. Kaufman, who testified that the hand laceration could have resulted from moving the hand over a fixed, jagged object—like the bent metal door of the van. Because we cannot determine exactly how Grady's hand was lacerated, we cannot say Sanchez's testimony was contrary to the "indisputable" laws of nature.[6] Thus, there is a reasonable basis in the record for the conclusion that Grady's hand was injured at the scene of the accident.

We turn now to the head abrasions. It is undisputed that Grady sustained these injuries while he was in police custody; photographs taken when Grady was originally processed revealed no visible injuries to his head. All of the medical experts agreed that the head abrasions were minor: there was no evidence of fractures, trauma or hemorrhaging. There was also very little bleeding, which suggested to all of the experts that the abrasions occurred around the time of death. Dr. Besant-Matthews theorized that the abrasions were defensive wounds sustained during the alleged beating. He claims that the force of the baton blow must have knocked Grady's handcuffs into his head. As numerous

[6] The plaintiffs 6 also argue that the lack of clotting in the wound indicates that it could not have been sustained seven hours earlier. But both Dr. Kaufman and Dr. Choi concluded that Grady received the bandage at least an hour before his death, and Dr. Kaufman concluded that the injury had been sustained at the scene of the accident.

witnesses testified, however, Grady was not wearing handcuffs at the time. Officer

Morales specifically remembers taking his handcuffs with him, and there was a strict policy against handcuffs in the lockup. Dr. Kaufman testified that Grady had most likely fallen unconscious and struck his head—first on the corner of the metal bench and then on the ground.[7] This testimony is consistent with the testimony of Gonzales, who was in the cell next to Grady and claimed that he never heard a struggle in Grady's cell, only a loud "thump" followed by silence. Dr. Kaufman's testimony, as corroborated by Gonzales, provides a reasonable basis for the jury to have concluded that the head abrasions occurred as Grady fell to the floor after the heart attack.

Finally, we turn to the scrapes on Grady's wrists. Dr. Besant-Matthews concluded that these scrapes were also sustained during the alleged beating, when the baton blows forced the handcuffs into Grady's wrists. As we have already explained, however, there is no evidence that a beating took place and no evidence that Grady was in handcuffs at the time. Dr. Kaufman testified that the scrapes likely occurred while Grady was handcuffed to the bench in the police station. For all we know, the

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[7] The plaintiffs claim that Dr. Kaufman contradicted himself on this point. In fact, Dr. Kaufman originally *assumed* that Grady had received the head abrasions during the car accident. When he learned that the two abrasions were sustained in the cell, he was initially skeptical that they could have resulted from a fall. When he learned that there was a metal bench in the cell, however, Dr. Kaufman concluded that the two abrasions could have been incurred during one fall.

scrapes could have been sustained during the car accident. This argument provides no basis for a new trial.

We do not overturn jury verdicts lightly. All of the plaintiffs' evidence was presented to a jury over the course of a seven-day trial. Our role is a narrow one: we must simply determine whether a "reasonable basis exists in the record to support the verdict." *Trzcinski v. American Cas. Co.*, 953 F.2d 307, 315 (7th Cir. 1992). The testimony given by the police officers, jail personnel, paramedics and, most importantly, his fellow arrestee established that Grady was not beaten in his cell. This testimony was corroborated by two medical experts who had performed full autopsies of Grady's body, Dr. Choi and Dr. Kaufman. Given the speculative nature of the plaintiffs' theory in this case, the record certainly provides a reasonable basis for the jury's decision.

III.

The plaintiffs also argue that defense counsel made inappropriate remarks at closing argument that require reversal. When explaining that the City of Chicago would indemnify the defendants in the event that they could not pay damages, defense counsel made the following statement: "The city is not a random amorphous entity. It's you. We're talking about tax dollars here." Closing remarks that appeal to jurors' pecuniary interests as taxpayers are, of course, generally improper. *Cf. United States v. Schimmel*, 943 F.2d 802, 806 (7th Cir. 2001).

But the plaintiffs did not object to this statement at trial. While the plain error doctrine is often applied in criminal

cases; it is rarely applied in civil cases. *See Stringel v. Methodist Hosp. of Ind., Inc.*, 89 F.3d 415, 421 (7th Cir. 1996). Plain error is only available in civil cases if a party can demonstrate that: (1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied. *See, e.g., Estates of Moreland v. Dieter*, 395 F.3d 747, 756 (7th Cir. 2005). Because the plaintiffs have made no attempt— either in their briefs or at oral argument—to show that these elements have been satisfied, we decline to review for plain error. *See Ammons-Lewis v. Metro. Water Reclamation Dist.*, 488 F.3d 739, 744 (7th Cir. 2007).

IV.

For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B – PRETRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED AND DECIDED JUNE 25, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FREDERICK MOORE,	)
Administrator, et al.	)
Plaintiff,	) Case No. 04 C 2545
	)
-VS-	)
	) Chicago, Illinois
OFFICER DONALD TULEJA,	)
STAR #3849; et al.,	) June 25, 2007
	) 11:20 a.m.
Defendants.	)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONOMBLE RUBEN CASTILLO

APPEARANCES:

For the Plaintiffs: MR. BERVE M. POWER
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(312) 263-5723

For Individual Defendants: MS. LIZA M. FRANKLIN
MS. KATHRYN M. DOI
MS. ANNE K. PRESTON
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Court Reporter:
KATHLEEN M. FENNELL, CSR, RMR, FCRR

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United States District Court
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THE COURT: What experience or expertise does he have with regard to this stress issue? He's not a cardiologist, right?

MR. POWER: Correct. No there are no cardiologists in this case; but the thing, Judge, is just like we can ask hypothetical questions to any one of the witnesses, particularly the experts, 'if I posed a question to Dr. Matthews, Dr. Matthews, if Mr. Grady was able to play the drums four hours a night, you know, if I wanted to ask him if that's considered excessive or how do I say it high cardiac level not cardiac level but high level of exercise, you know, what is his position with respect to the stress associated with the arrest.

Here, Judge, Dr. Kaufman is going to say Mr. Grady was living on borrowed time for two years, and I asked

16 Dr. Kaufman to define borrowed time. He said -if someone
17 walked up a flight of stairs, they could keel over, If
18 someone yelled at someone, they could keel over.
19 And so you got that person that could testify to
20 Mr. Grady living on borrowed time, and, of course, I'm going
21 to ask him questions about activity level that will come in
22 through family and musicians, but then here Dr. Matthews
23 shouldn't be precluded from being able to say if someone was
24 able to engage in this kind of activity that it wouldn't
25 constitute borrowed time or anything else, living on borrowed

1 time.
2 MS. FRANKLIN: That's not actually the issue.
3 THE COURT: Yeah, I don't think that's the issue,
4 but go ahead. Tell me.
5 MS. FRANKLIN: Dr. Matthews talks in the dep about
6 how stressful he would consider it to be involved in a car
7 accident and then another car accident and then to be
8 arrested, and that's improper.
9 THE COURT: That's at pages what of the deposition?
10 I just want to get a good feeling for what that testimony
11 looks like.
12 MS. DOI: 232.
13 THE COURT: Did you attach that?
14 MS. DOI: Yes.
15 THE COURT: Okay. Hold on.
16 MS. DOI: It's the last page.
17 THE COURT: I got jt.
18 MS. FRANKLIN: 231 , 232.
19 THE COURT: This is him being questioned on
20 cross-examination in the deposition?
21 MS. FRANKLIN: Yes, by plaintiffs' counsel .
22 THE COURT: This is questioning by plaintiffs'
23 counsel.
24 MS. FRANKLIN: Yes.
25 THE COURT: Okay.

MR. POWER: Judge, may I offer something?
THE COURT: Go ahead . Say whatever you want.
MR. POWER: Sure. These questions were only a result of defense counsel going through the exact same questions with Dr. Matthews on direct, which is, well, Dr. Matthews, isn't getting in a car accident stressful? Yes. Isn't getting arrested stressful? Yes. Isn't being put in a cell stressful? Yes.
And so they went through these questions on direct, and I simply crossed him on the exact same questions in comparison to other activity that Mr. Grady engaged in. This case is not about a heart attack. It's about excessive use of force.
THE COURT: That's your version.
MS. DOI: Yes.
THE COURT: That's your version of the case when you say that.
MR. POWER: Well, I do, Judge, because I have the

19 burden of establishing excessive use of force. And so here
20 if -- Dr. Matthews 'is going to be precluded from saying
22 this, that means Dr. Kaufman has to be precluded from saying
22 the exact same thing because he's questioned on these very
23 same points. Matter of fact, he offers in his deposition,
24 well, he had all these things happen to him on one day, and
25 so he just keeled over.

1 And so we can't preclude Dr. Matthews from going
2 into this area if Dr. Kaufman is going to be allowed to go
3 into the very same area.
4 THE COURT: Want to respond to that.
5 MS. FRANKLIN: It's not going into the area that's
6 the problem. The problem is that Dr. Matthews talks about
7 how --
8 THE C0URT: Dr. Kaufman, just to go to that, he's
9 not a cardiologist. He's a pathologist.
10 MS. DOI : Forensic pathologist .
11 THE COURT: Right. And there he's talking about
12 cause of death.
13 MS. FRANIKLIN: Yes, your Honor, and he doesn't talk
14 about whether the stress of being arrested was low, medium or
15 high stress for Mr. Grady. He doesn't talk about how being
16 arrested 'in a non-confrontational manner was any more
17 stressful than anything else he may have experienced during
18 the course of that day.
19 MS. DOI: Nobody can testify to that except
20 THE COURT: Well, that is exactly the point. The

21 point is that no one can testify what was stressful to
22 Mr. Grady.
23 I will allow the pathologist to testify to the
24 extent of their expert opinion what are different things
25 that are stressful; but after that, we're really getting into

speculation as to what was stressful to Mr. Grady and what
was not.
And if I were you, Mr. Power, I wouldn't go too far into this.
MR. POWER: Judge, it was only in response to what had happened in his deposition, Judge. They raised it. I responded.
THE COURT: Well, just so you know, just so you get a sense of what I think is just not going to cut it, which as it was a bad answer which I don't even think you'd want to go into: "Question" this is 232, line 13 "And is there any indication that Mr. Grady being arrested in a non-confrontational manner ì¡/as any more stressful than anything else he may have experienced?"
I think that question is totally objectionable, and as it was, his answer was, "That's a little hard to know how he'd react because I've never met him and talked to him."
MR. POWER: No problem, Judge.
THE COURT: Okay.
MR. POWER: Just so long as Dr. Kaufman does not go

21 into that same area , it 's fine.
22 THE COURT: It would be the same type of rulings
23 for both witnesses.
24 So with that understanding, I'm going to deny
25 motion in limine 23 -in total , and we will allow Mr. Matthews

APPENDIX C –POST-TRIAL RULING OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DATED AND DECIDED August 8, 2007.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERNDISTRICT OF ILLINOIS
EASTERN DIVISION

FREDERICK MOORE, Administrator, et al.	)	
Plaintiff,	)	Case No. 04 C 2545
-vs-	)	
	)	Chicago, Illinois
OFFICER DONALD TULEJA,	)	August 8, 2007
Star #3849; et al.,	)	9:52 a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUBEN CASTILLO
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(Proceedings heard in open court:)
THE CLERK: 04 C 2545, Moore versus Tuleja.
MS. DOI: Good morning, your Honor. Kathryn Doi on behalf of defendants.
MS. PRESTON: Good morning, your Honor. Anne Preston on behalf of defendants.
MR. POWER: Good morning, Judge. Berve Power and Lena Henderson on behalf of the plaintiffs.
THE COURT: Okay. First of all, I'll grant the motion for leave to exceed the page limit. We'll take in your memorandum.
MR. POWER: Thank you, Judge.
THE COURT: I have read it very carefully. I've

14 also read the City's response. I'm not going to take any
15 further argument at this point.
16 I think for all the reasons stated in the City's
17 response, as well as my own from having presided over this
18 case, unfortunately, I'm going to deny the motion filed by
19 the plaintiffs. I think you've come to the end of the line
20 in this court.
21 I think what has occurred here in this post-trial
22 motion is even if you accept that there hasn't been a waiver,
23 which I will rule on the merits, although the City has a good
24 argument because you didn't renew or make any motion at the
25 completion of all the evidence, but I think what this is is a

1 mere reargument of all the arguments you made during the
2 trial.
3 I think during the trial, as well as leading up to
4 the trial, I made all the rulings and rulings that were
5 deferential to the plaintiffs' case.
6 It's unfortunate that various attempts by this
7 Court to try and get the plaintiff to acknowledge that there
8 was a weak liability case really were just never acknowledged
9 and that this case proceeded to an all-or-nothing solution,
10 which was, I think, a disservice to the estate.
11 But, nevertheless, I think the jury, properly
12 hearing the evidence, was properly instructed on the rules
13 that applied. I think the Court made the appropriate rulings
14 on objections that were made, and ultimately it was a

15 credibility decision that the jury made, obviously crediting
16 the testimony of Dr. Kaufman over some of the testimony of
17 Dr. Choi.
18 I will also reflect, as the person who presided
19 over the trial, that I believe that Dr. Choi gave misleading
20 testimony where he suffered from an inability to completely
21 have command of the English language, which plaintiffs'
22 attorney took full advantage of during cross-examination.
23 But, nevertheless, it was clear to me as well as
24 the jury what was actually happening in terms of what he was
25 conceding and what he was not.

But ultimately, the linchpin to the defendants' case was the testimony of Dr. Kaufman, who ironically was retained initially by the plaintiffs' estate. I think Dr. Kaufman gave credible testimony which was not impeached, and the jury credited that testimony which was proper after I allowed all the theories of liability to proceed to a jury determination.

All I can say is that the jury properly and soundly rejected all the theories in a very short period of time.

The plaintiff argues that there was inappropriate closing argument. There was no objection made to that. If there would have been an objection made to the argument, I would have sustained the objection. There was none.

Nevertheless, I think it's a stretch to somehow

15 conclude that this jury, which was principally composed of
16 non-city residents, somehow made some improper determination.
17 I see no plain error at all. What I see is a verdict that
18 was not a surprise to the Court.
19 So for all those reasons, as well as the reasons
20 contained in the defendants' memorandum, the plaintiffs'
21 post-trial motion will be denied. I strongly encourage the
22 parties to resolve any other issues that might come before
23 the Court. That's all I'm going to say.
24 Thank you.
25 MR. POWER: Thank you.

MS. DOI: Thank you, your Honor.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Kathleen M. Fennell Date

Official Court Reporter